

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY,
SEAN PARNELL, THOMAS A.
FRANK, NANCY KIERZEK, DEREK
MAGEE, ROBIN SAUTER, MICHAEL
KINCAID, AND WANDA LOGAN,
Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY,
HONORABLE THOMAS W. WOLF,
KATHY BOOCKVAR,
Respondents.

NO. 620 MD 2020

**ANSWER OF RESPONDENT PENNSYLVANIA
GENERAL ASSEMBLY TO PETITIONERS' MOTION
FOR EMERGENCY/SPECIAL PROHIBITORY INJUNCTION**

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Respondent the Pennsylvania General Assembly, by its counsel, Stradley Ronon Stevens & Young, LLP, answers in opposition to petitioners' motion for emergency/special prohibitory injunction as follows:

1. One of the six requirements for emergency injunctive relief is that petitioners "must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits." *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

2. Where a petitioner fails to demonstrate a likelihood of success on the merits, our courts will not hesitate to reject a request for injunctive relief. *See, e.g., Weeks v. Dep't of Human Servs.*, 222 A.3d 722 (Pa. 2019) (affirming denial of preliminary injunction because appellant failed to demonstrate a likelihood of success on the merits); *Kaehl v. City of Pittsburgh*, 687 A.2d 41 (Pa. Commw. 1996) (affirming denial of preliminary injunction because appellants failed to establish a reasonable likelihood of success on their claims).

3. In this case, petitioners claim that Pennsylvania Act 77 of 2019 violates Article VII of the Pennsylvania Constitution. *See* Petition for Review, ¶¶1, 16, 17, 54-60, 66, 75, 81, 87.

4. To succeed, petitioners carry a very heavy burden. “[E]very enactment of the General Assembly is presumed valid.” *Weeks*, 222 A.3d at 727. A statute will “only be stricken if the challenger demonstrates that it clearly, palpably, and plainly violates the Constitution.” *Id.* (cleaned up); *see also* 1 Pa.C.S. §1922(3) (presumption that the Legislature does not intend to violate the state or federal constitutions).

5. “The party seeking to overcome the presumption of validity bears a heavy burden of persuasion.” *Weeks*, 222 A.3d at 727 (citation omitted). “Any doubts about whether a challenger has met this high burden are resolved in favor of finding the statute constitutional.” *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

6. For the reasons stated in the General Assembly’s preliminary objections (filed November 23, 2020, and incorporated herein by reference), petitioners are unlikely to prevail on the merits.

7. To begin, petitioners cannot prevail on the merits before this Court because it lacks jurisdiction under Section 13(2) of Act 77. That provision specifies that the Supreme Court of Pennsylvania—not this Court—has exclusive jurisdiction to hear petitioners’ challenge.

8. Section 13(2) states that “[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1),”¹ and paragraph (1) in turn includes Article XIII-D, which petitioners challenge here. *See* Act 77, §13(1)(xxi). This Court already invoked these provisions when it transferred the Act 77 challenge in the *Crossey* case to the Supreme Court’s exclusive jurisdiction. The Supreme Court agreed with this Court’s jurisdictional assessment, and then decided the merits. *See Crossey v. Boockvar*, Pa. Commw. No. 266 MD 2020 (order of June 17, 2020), Pa. Supr. No. 108 MM 2020 (orders of Aug. 26, 2020 & Sept. 17, 202 at 2 n.4).

9. For these reasons, the Supreme Court has exclusive jurisdiction over this dispute. Thus, petitioners thus cannot succeed on the merits before this Court because they are asking for relief only the Supreme Court is authorized to grant.

¹ It is constitutional for the General Assembly to specify the Supreme Court’s exclusive jurisdiction. *See Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 392-93 (Pa. 2005) (reviewing enactment with similar exclusive jurisdiction provision and deciding that, despite the “unique posture,” the court had “jurisdiction over this matter to resolve Petitioners’ challenges and request for declaratory judgment”); *see also* 53 P.S. §12720.702 (“[t]he Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of” the Pennsylvania Intergovernmental Cooperation Authority Act); *Local 22 v. Commonwealth*, 613 A.2d 522 (Pa. 1992) (noting that, under §12720.702, the Supreme Court had exclusive jurisdiction); 24 P.S. §20-2013-B (similar provision in School Code); 24 P.S. §6-636.1(h) (same); *West Phila. Achievement Charter Elem. Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957 (Pa. 2016) (noting that, under 24 P.S. §6-691, the Court had exclusive jurisdiction).

10. Petitioners also cannot succeed on the merits because their claims are time-barred.

11. Section 13(3) of Act 77 states that “[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section.” Act 77, §13(3). As noted above, paragraph (2) applies to petitioners’ challenge.

12. Act 77 went into effect on October 31, 2019, so the 180-day challenge window ended on April 28, 2020. Petitioners filed this action much later, on November 11, 2020. Therefore, this action is time-barred.

13. Finally, petitioners cannot show they are likely to succeed on the merits because their challenge under Article VII of the Pennsylvania Constitution fails as a matter of law.

14. Petitioners contend the Pennsylvania Constitution prohibits a voting method added by Act 77. This argument is predicated on a fundamental misreading of both the Constitution and petitioners’ own authorities. The votes petitioners seek to invalidate were cast by a constitutionally-permissible method.

15. Article VII, Section 4 of the Pennsylvania Constitution grants the Legislature broad discretion in authorizing how citizens may vote. It states that “all elections by the citizens shall be by ballot or by such other method as may be prescribed by law.” PA. CONST. ART. VII, §4 (emphasis added).

16. Petitioners’ attempt to limit voting to two methods (in-person and absentee) would render the legislative discretion conferred by Article VII, Section 4 meaningless. Their claim must fail for that reason alone. *See Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (“because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible”).

17. Beyond section 4, no other provision of Article VII prohibits any of the Election Code amendments contained in Act 77. *See, e.g.*, PA. CONST. ART. VII, §1 (qualifications of electors); *see also* 25 P.S. §2602 (qualified elector definition); 25 P.S. §2602(z.6) (Act 77 adoption of existing qualified elector definition); 25 P.S. §3150.11.

18. Petitioners nevertheless contend that the absentee voting provisions in Article VII, Section 14 serve as a restriction on voting methods. But they mistake a mandate for a limit. That provision states that “the Legislature shall, by general law, provide a manner in which, and the time and place at which” absent electors may nonetheless cast their vote. PA. CONST. ART. VII, §4.

19. By using the word “shall,” Section 14 requires the Legislature to enact absentee voting provisions as a constitutional “floor.” But that Section says nothing about what the legislature may—or may not—do in terms of voting methods. And, as noted, under Section 4, the General Assembly has the discretion to allow “such other methods” for voting—including those laid out in Act 77.

20. Petitioners' claim is based on two older cases addressing decidedly different issues on very different facts. Those cases dealt only with the constitutionality of extra-territorial voting in the era before absentee voting. Those cases do not address the in-state voting method at issue here. *See Chase v. Miller*, 41 Pa. 403 (1862) (holding unconstitutional a since-repealed statute permitting Civil War soldiers fighting out-of-state to vote under since-annulled provision of Pennsylvania Constitution allowing certain citizens to vote as long as they resided in their voting districts within 10 days before an election); *In re Contested Election in Fifth Ward of Lancaster County*, 281 Pa. 131 (1924) (holding statute unconstitutional based on same since-annulled residency requirement).

21. In sum, petitioners' claims are based on a misapplication of Article VII of our Constitution and inapposite and outdated cases. Act 77 is constitutional. As a result, petitioners cannot show they are likely to succeed on the merits.

For these reasons, Respondent Pennsylvania General Assembly requests that the Court deny petitioners' motion for emergency/special prohibitory injunction.

Respectfully Submitted,

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